78-1278

In The

Supreme Court of the United States

October Term, 1978

No.

OSWALD JOHN,

Petitioner,

-against-

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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No.

OSWALD JOHN,

Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT

Petitioner, Oswald John, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 19, 1978, which affirmed a judgment of the United States District Court for the Virgin Islands, Division of St. Croix (Young, J.), entered on a jury verdict convicting the defendant of the crimes of sodomy and rape and sentencing him to the custody and control of the Attorney General for consecutive terms of five years on the sodomy count and fifteen years on the rape count.

OPINION BELOW

The memorandum/order of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals for the Third Circuit, in a unanimous memorandum/order, affirmed a judgment of the United States District Court for the Virgin Islands (Young, J.), entered on April 17, 1978.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 30 days of receipt of the order of the Court of Appeals, dated January 17, 1979 which denied petitioner's motion for remand and reconsideration *en banc*.

QUESTIONS PRESENTED

1. Was the admission of otherwise hearsay, self-serving testimony proper under the "excited utterance" exception to Rule 803[2] of the Federal Rules of Evidence?

2. Is the Virgin Islands' sodomy statute unconstitutional on its face?

3. Was there a fatal variance between Count II in the indictment and the proof at trial?

4. Was the proof at trial sufficient to convict petitioner of forcible rape and sodomy?

STATUTES INVOLVED

The statutory provisions involved are Rule 803[2] of the Federal Rules of Evidence, 14 V.I.C. §2061, 14 V.I.C. §1701 and 14 V.I.C. §1706.

STATEMENT OF FACTS

Petitioner Oswald John was convicted following a jury trial of the forcible rape and sodomy of one Jasmine Brown, a crime which allegedly occurred during the evening hours of November 25, 1977 in petitioner's home in Estate Whim, St. Croix, United States Virgin Islands, after petitioner picked up the hitchhiking complainant.

The Government's proof at trial, viewed in the light most favorable to it, consisted of Ms. Brown's testimony that she consumed a small quantity of wine in petitioner's home, was not permitted to leave, and was forced to engage in sexual intercourse with John and sodomy with petitioner and his co-defendant, Hermenegilde Joseph.

No physician or medical technican was called by the Government to confirm the claim of rape, much less that intercourse occurred at all. Thus, to satisfy the rape corroboration requirement imposed by 14 V.I.C. §1706, the Government was permitted to introduce the testimony of Ms. McIntosh, a neighbor of John's, who stated that during the early morning hours of November 26, 1977, she was awakened by the sound of Ms. Brown, partially clad and apparently emotionally upset, who asked to use the telephone.

Rather than calling the police or her parents, Ms. Brown called her boyfriend, Tony Woodcock. Since he was not at home, she spoke to his aunt. As a result of this conversation, Ms. Brown learned that her family and the police were out looking for her. Then, in response to Ms. McIntosh's question as to what had occurred, Ms. Brown related what she claimed had happened inside petitioner's house, an account of forcible intercourse and sodomy.

In its jury charge, the Court told the jury it might find corroboration from the presence of complainant's shoes, bag and glasses in defendant's house.

The jury convicted both defendants and a panel of the Court of Appeals for the Third Circuit affirmed the conviction on December 19, 1978. A timely motion to rehearing *en banc* was filed on or about December 29, 1978 and, by an order entered on January 17, 1979, said motion was denied.

REASONS FOR GRANTING THE WRIT

I.

The improper and highly prejudicial admission of Ms. McIntosh's self-serving hearsay testimony violates the excited utterance rule found in Rule 803[2] of the Federal Rules of Evidence.

The sole item of corroboration statutorily necessary to secure a conviction which was profferred by the Government entered the case through the testimony of one Ms. McIntosh. Judge Young permitted Ms. McIntosh, a conceded non-witness to the crime, to testify concerning the account of events related to her by Jasmine Brown in response to a question posed by Ms. McIntosh concerning what had happened to the girl.

Judge Young admitted said account on the theory that it was an "excited utterance"[1] and as such constituted a valid exception to the hearsay rule. We most respectfully disagree with the Court's ruling and contend it was error to so rule.

Any analysis of the propriety of Judge Young's ruling begins with the realization that Ms. McIntosh's account of Jasmine Brown's statement was rank hearsay unless it properly qualified as an exception to the hearsay rule. As such, the burden rested upon the Government, as the party seeking to affirmatively utilize the statement, to demonstrate that all of the

1. The "excited utterance" exception is recognized as a valid exception to the hearsay rule under Rule 803[2] of the Federal Rules of Evidence.

elements of the "excited utterance" exception were properly and competently established. *Kornicki v. Calmar S.S. Corp.*, 460 F.2d 1134 (3d Cir. 1972); *Guest v. Bailes*, 448 F.2d 443 (6th Cir. 1971).

With the apportionment of the burden of proof in mind, we turn to the merits of the ruling.

As United States District Judge Jack B. Weinstein noted in his treatise *Weinstein's Evidence*, Section 803(2)[01] (Weinstein & Berger, 1977 Matthew Bender), the excited utterance exception has its genesis with Professor Wigmore [6 Wigmore, *Evidence*, Sections 1745-1764, Section 1746 at p. 135 (3d Ed. 1940)] and is based upon:

> "The assumption underlying this exception is that a person under the sway of the excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication and that, consequently, any utterance he makes will be spontaneous and trustworthy." *Weinstein's Evidence, supra*, Section 803(2)[01] at p. 803-80.

See also, Kornicki v. Calmar S.S. Corp., supra, at p. 1136.

Thus the proponent of the alleged excited utterance must clearly first establish that there was a startling event or condition. Certainly a sexual attack could constitute such an event. *E.g., Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1954), *cert. denied*, 74 S. Ct. 876 (1954); *United States v. Brooks*, 378 F.2d 338 (3d Cir. 1967).

However, the proponent must demonstrate the statement was prompted by the unusual event *and* that the declaration was made while the declarant was still under the stress of the event prior to having both the opportunity and motive to fabricate.

Picker X-Ray Corp. v. Frerker, 405 F.2d 916 (8th Cir. 1969); *McCurdy v. Greyhound Corp.*, 346 F.2d 224 (3d Cir. 1965).

We respectfully contend that since in this case the "excited utterance" occurred several hours after the alleged attack, it was not made spontaneously to Ms. McIntosh. Rather, it was a response to the latter's questioning after the former placed a telephone call to her boyfriend, Tony Woodcock, and at a time when she knew her mother and the local police were looking for her.

Clearly the passage of time between the alleged event and the utterance[2], the fact the statement was in response to a question[3] and was not a spontaneous declaration, and that it was uttered at a time when the declarant had the opportunity to fabricate combine to deprive the statement of the requisite spontaneity sufficient to satisfy Rule 803[2].

Clearly the sheer passage of time and Ms. Brown's knowledge of the need to fabricate a story to justify her whereabouts overnight away from home provided her with the requisite opportunity to lay the foundation for her alibi in responding to Ms. McIntosh's question.

We do not contend that the excited utterance is *per se* inapplicable to prosecutions for sex or other crimes. Had the statement been made closer in point of time to the incident and

2. *See, United States v. Moss*, 544 F.2d 954 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 822 (1977), wherein the Court held that the passage of several hours deprived the statement of the requisite spontaneity to satisfy the rule. The holding in *Moss* is clearly contrary to the position taken by the Third Circuit and raises a conflict of law amongst the courts which should be resolved by this Court.

3. The fact the statement was in response to a question and not a volunteered statement has frequently been cited as a basis for barring the use of such a statement. *Richardson on Evidence*, Sec. 283 (Prince, 10th Ed., Brooklyn Law School, 1973).

had it not been made only after Jasmine learned from Tony Woodcock's aunt that her mother was out looking for her with the police — then could it be said the statement was sufficiently reliable to go to the jury.

We submit, however, that this statement is devoid of any such indicia of reliability and, moreover, contains all the earmarks of adolescent fabrication. Accordingly, it was non-harmless error to permit this self-serving statement, which constituted the sole piece of corroboration, to be admitted into evidence.

Furthermore, the need for authoritative guidance from the court upon an important aspect of the Federal Rules of Evidence involving a section utilized in both civil and criminal cases provides an independent basis for a grant of certiorari.

II.

The Virgin Islands' sodomy statute is unconstitutional upon its face. Any conviction returned under it must be vacated.

The Virgin Islands' sodomy statute should be set aside because it is facially overbroad, infringes upon individual privacy and sweepingly condemns sexual practices committed in private by consenting adults.

On its face, the statute prohibits any variation of sodomy, fellatio, cunnilingus and anal sex committed by consenting adults, even if the couple is married and even if the conduct occurs in the privacy of one's home.

A statute this broadly couched, we respectfully submit, infringes upon the individuals' penumbral rights to privacy and to practice sexual freedom.[4] *Cf., Griswold v. Connecticut*, 381

4. The statute is not restricted to public acts. *Cf., Raphael v. Hogan*, 305 N.Y.S. 2d 749, 756 (S.D.N.Y. 1969).

U.S. 479, 484-485, 85 S. Ct. 1678, 14 L. Ed. 510; *Stanley v. Georgia*, 394 U.S. 557, 564-568, 89 S. Ct. 1234, 22 L. Ed. 2d 542.

Furthermore, since a fundamental interest in each citizen's guaranteed constitutional right to life and liberty encompasses the obtaining of private sexual satisfaction, statutes which purport to regulate private sexual relations must be deemed to be creating a suspect classification as to those adults who choose to engage in private acts of sodomy. To sustain such an incursion into the realm of personal privacy, the proponents of the statute must come forward with a compelling state interest sufficient to permit a legislative prohibition of this nature. *Cf., Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

We respectfully dispute the notion that the State can ever advance a legitimate, compelling interest sufficient to intrude into such affairs of the boudoir. Thus the burden of proof rests with the proponents of the statute to empirically demonstrate that consensual sodomy materially harms the public health, safety or welfare in such a fashion that severe criminal sanctions are necessary to deter the subject.

Furthermore, we dispute the idea that such acts of deviate sexual intercourse are, in and of themselves, intrinsically harmful or unnatural or create or cause any deviation from fundamental human nature.[5]

Indeed, in 1973 the Board of Trustees of the American Psychiatric Institute recommended that homosexuality be removed from the list of mental diseases (*New York Times*, December 16, 1973, p. 1, col. 1). This recommendation met with the approval of the A.P.A.'s membership in 1974 (*New York Times*, April 9, 1974, p. 12, col. 4).

5. *See*, Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich. L. Rev. 1613 (1975), for a discussion upon the lack of empirical data on the alleged adverse effect of homosexuality upon the social system.

According to one study of recent sexual patterns of unmarried heterosexual persons between the ages of 18 and 24, 72% of the sample performed fellatio, 69% performed cunnilingus and one-sixth of all persons under 25 years of age have engaged in anal intercourse. Hunt, *Sexual Behavior of the 1970's*, pp. 166-167 (1974), cited with approval by Judge Taylor in *In re P*, 92 Misc. 2d 62, 400 N.Y.S. 2d 455 (Fam. Ct. 1977).

In essence, the statute at bar seeks to do nothing more than place the Government in the position of determining those sexual activities which are "normal" and "proper" and those which are not. Absent proof of some compelling state interest, the statute places the constable in the role of "tastemaker", determining when certain actions are sufficiently distasteful as to offend the statute.

In the past several years some 17 states have decriminalized their consentual sodomy statutes. *In re P, supra*, at p 463, n. 20.

Various lower courts have overturned such statutes. *People v. Johnson*, 77 Misc. 2d 889, 355 N.Y.S. 2d 266 (Cty. Ct. 1974); *People v. Rice and Mehr*, 80 Misc. 2d 511, 363 N.Y.S. 2d 484 (Dist. Ct. 1975), *rev'd*, 383 N.Y.S. 2d 798 (App. Trm. 1976), *aff'd*, 41 N.Y. 2d 1018,[6] 395 N.Y.S. 2d 626 (1977); *In re P, supra.*

Concededly, this Court has upheld such statues. *Rose v. Locke*, 423 U.S. 48 (1975); *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

Nonetheless, we contend this statute is so far-reaching and

6. In affirming the reversal by the appellate term, the Court of Appeals did not reach the merits of the constitutional argument, holding only that the issue had been raised prematurely and should await the results of the criminal trial.

covers such a multitude of intimate activity, in public or private, among the married and unmarried, that it can be said the Government is permitted to spy in the bedroom and under the sheets of its citizens.

Accordingly, a conviction rendered under such a statute should not be permitted to stand. Plenary review by this Court of this serious conflict between the Government's power to legislate and personal privacy is warranted.

III.

The variance between Count II and the proof at trial required a dismissal of the sodomy count and a vacature of the five year sentence imposed thereunder.

Count II of the indictment charged each defendant with committing separate acts of sodomy upon Jasmine Brown in violation of 14 V.I.C. §2061 in the following manner:

> "On or about the 26th day of November, 1977 in the Virgin Islands of the United States, Judicial Division of St. Croix, Hermenegilde Joseph and Oswald John did carnally know Jasmine Lenore Browne, by and with the mouth."

Thus, the way the count is pleaded, in non-accessorial fashion, the contention was that the defendants each utilized their own mouth to perform sodomy[7] upon Ms. Brown. The testimony at trial, if credited, demonstrated just the contrary, *i.e.*, that Ms. Brown used her mouth to carnally know Ms. Joseph and petitioner.

---

7. We presume cunnilingus, but the Government did not so indicate in a bill of particulars or in any other fashion.

Under these circumstances, we contend there was a major factual departure between the pleading and the proof which so readily altered the nature of what Count II charged as to deprive the defendants of a fair notice, the hallmark of due process, and a fair trial. *Berger v. United States*, 295 U.S. 78 (1935); *Stirone v. United States*, 361 U.S. 212 (1960); *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969); *Goodman v. United States*, 341 F.2d 272 (5th Cir. 1965).

Concededly every departure between the pleadings and the proof in a criminal case does not give rise to the conclusion that there has been a fatal variance (see Rule 7 of the Federal Rules of Criminal Procedure) unless there is some indication of prejudice. *United States v. Radowitz*, 507 F.2d 109 (3d Cir. 1974); *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946).

However, as the Third Circuit noted in *United States v. Somers*, 496 F.2d 723 (1974), where the variance in question modifies the elements of the crime charged, this Court will apply the *per se* rule of *Stirone v. United States, supra*, and reverse.

We respectfully submit the *per se* rule is applicable to the case at bar because of the substantial difference it makes in a sodomy charge as to which individual utilized the mouth to perform the acts in question. Clearly there has been a major alteration in what the defendants were charged with which surprised and hindered the defendants' efforts to protect and defend themselves from the charge which had been leveled.

Under the facts of this case, the substantial nature of the variance requires a vacature of the conviction under Count II. At the very least, the importance of this issue, not dealt with by this Court since the decision in *Stirone*, advances a need for final review by this Court.

IV.

The evidence was legally insufficient to establish defendant's guilt beyond a reasonable doubt.

Oswald John, a St. Croix businessman never previously convicted of a crime, was found guilty of committing sodomy and rape in his own home following a jury trial before Judge Young on the uncorroborated testimony of a 16-year old hitchhiker.

Viewing the evidence in the light most favorable to the Government [*Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Blair*, 456 F.2d 514 (3d Cir. 1972); *United States v. McClain*, 469 F.2d 68 (3d Cir. 1972)], the Government was compelled, in its effort to establish defendant John sodomized Jasmine Brown in violation of 14 V.I.C. §2061, to competently establish John carnally knew[8] Ms. Brown.

Although the indictment pleaded that John knew Ms. Brown with the mouth, the proof at trial, if believed, indicated it was Ms. Brown who allegedly utilized her mouth. This incident allegedly occurred after John had raped Ms. Brown.

Assuming this variance in proof was not a *per se* fatal bar to the conviction under Count II (see Point III), we contend the proof was insufficient to establish what portion of John's anatomy Ms. Brown allegedly "sucked". Her testimony in this connection was as follows:

> "He came inside and he said something to her about letting me suck him for, I don't remember exactly how many minutes he said, but

8. The prosecution's theory and Count II in the indictment charged that John and his co-defendant each performed a separate act of sodomy. There was no claim that one defendant aided and abetted the other.

> I remember he did say minutes, and he told me to do it. I didn't want to so he told me I had to do it. So I did it."

Ms. Brown's testimony is devoid of any proof she was physically forced to perform said "sucking" or precisely what it was she sucked. We respectfully contend that, at the very least, to obtain a conviction under the consentual sodomy statute[9] which John was charged under, the Government must have established carnal knowledge (*i.e.*, either anal intercourse or fellatio) and that there was the requisite statutory penetration (14 V.I.C. §2063). We submit Ms. Brown's testimony was simply too vague to establish either fellatio or the required penetration.

Thus, absent competent and credible proof that John's penis penetrated Ms. Brown's mouth and she sucked upon his penis, the crime of sodomy was not established as a matter of law.

We likewise contend the evidence offered by the Government to establish Count III, the rape count, was constitutionally deficient because the statutorily required proof of corroboration was never established.

Corroboration

Section 1706 of Title 14 of the Virgin Islands Code states:

> "No conviction can be had for rape upon the testimony of the person defiled, unsupported by other evidence."

9. We attack the constitutionality of the non-forcible sodomy statute on the basis that it infringes upon the personal right of privacy and infringes upon personal rights in an area beyond which any government has the right to legislate (see Point II, *supra*).

As the revision note to Sec. 1706 and the decision in *Government of Virgin Islands v. Carr*, 451 F.2d 652 (3d Cir. 1971) makes clear, the corroboration statute[10] was predicated upon New York State's corroboration statute (former Penal Law Sec. 2013, recodified in 1965 as Penal Law Sec. 130.15, repealed New York Laws of 1974, Chapter 14, Sec. 1).

The New York statute required the prosecution to corroborate every material fact[11] necessary to constitute the crime. *People v. Radunovic*, 21 N.Y. 2d 186, 287 N.Y.S. 2d 33, 234 N.E. 2d 212 (1967); *People v. Linzy*, 31 N.Y. 2d 99, 335 N.Y.S. 2d 45 (1972); *see also, Practice Commentary* by Judge Richard G. Denzer and Peter McQuillan to New York Penal Law Sec. 130.15 (McKinney 1976), at p. 279.

Unwilling or perhaps unable to produce any form of medical or clinical corroboration, the prosecution attempted to meet the corroboration requirement through the testimony of Ms. Hortencia McIntosh, who was permitted to relate the self-serving, hearsay utterances of Jasmine Brown. This testimony was to the effect that sometime after 5:00 a.m. on the morning of November 26, 1977, she was awakened by the sound of Jasmine Brown pounding at the front door of her cottage. The female intruder was crying and had her pants and bra in her hand.

Ms. Brown did not cry out to Ms. McIntosh that she had been defiled. Rather, she asked if she could use Ms. McIntosh's telephone! Ms. McIntosh spoke to the party contacted, the complainant's boy friend's aunt, and was told the complainant's mother and the police were out looking for Ms. Brown. Only

10. The legislative theory for enacting this rule was the recognition that crimes of this nature were easily charged and very difficult to disprove in view of the instinctive horror which they engender. *People v. Friedman*, 139 App. Div. 795, 124 N.Y.S. 521 (1910).

11. These elements would be identity, penetration and force.

after Ms. Brown learned her hostile mother had brought the local police into the picture did Ms. Brown begin to tell Ms. McIntosh what had allegedly occurred.

According to Ms. McIntosh's account, Ms. Brown told her:

> "They made her take off her clothes and the man had sex with her repeatedly. And, she was crying and she told him to stop because she was tired and he still continued having sex with her. Then he fell asleep and the girl, the lady, she started to make her have oral sex with her."

This testimony, even if believed, does not corroborate John's identity as the perpetrator in a forcible, non-consented to rape. We are never told who "he" is, nor are we told what having "sex" with Ms. Brown connotes. It may not have involved sexual intercourse, but merely sodomy. As such, the testimony, even if true, is not properly corroborative.

We respectfully submit that even if, as in the case at bar, the evidence of corroboration is predicated upon "recent outcry",[12] at least one court has disputed whether "recent outcry" can provide the requisite corroboration. *People v. Watson*, 45 N.Y. 2d 867, 410 N.Y.S. 2d 577 (1978), *rev'g*, 57 A.D. 2d 143, 393 N.Y.S. 2d 735 (2d Dept. 1977).

In this context we are not unaware of a decision by a panel of the Third Circuit in *Govt. of Virgin Islands v. Brooks*, 378 F.2d 338 (1976), which upheld defendant's conviction for the rape of a 15-year old girl on the basis of her post-incident disheveled appearance and the promptness with which she reported the incident.

12. We dispute that the statements made by Jasmine Brown to Ms. McIntosh were anything other than rank self-serving hearsay, not offered *ante litum motum*, and not sufficiently contemporaneous to the act itself to qualify as *bona fide* utterance such as to take it out of the restrictions of the hearsay rule. See Point I, *supra*.

We submit the *Brooks* case is distinguishable because there was requisite corroboration supplied by the testimony of the doctor who examined the victim and by the defendant's own admissions. Accordingly, the panel's reference to the victim's appearance and her prompt reporting of the incident were merely corroborative factors in an otherwise strong case and as such were pure *dictum*.

Even assuming *arguendo* that this Court disagrees, we most respectfully submit the holding that "prompt outcry" can constitute sufficient corroboration has been undermined by later decisions in New York cases interpreting the very statute upon which 14 V.I.C. §1706 was based. We think these cases indicate that if all that is offered by way of corroboration is "prompt outcry", then the evidence is legally and constitutionally insufficient to support a guilty verdict under the rape count.

The absence of evidence of proof beyond a reasonable doubt and the constitutionally mandated burden of proof [*In re Winship*, 397 U.S. 358 (1970)], requires a finding that due process has been violated. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

Accordingly, for the reasons set forth above, the writ of certiorari should be granted, the verdicts should be set aside, the judgment of conviction vacated and the indictment dismissed.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

ROGER BENNET ADLER
Attorney for Petitioner

EMANUEL GROWMAN
On the Brief

APPENDIX A — MEMORANDUM/ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1618

GOVERNMENT OF THE VIRGIN ISLANDS

v.

OSWALD JOHN,

Appellant.

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX

(D.C. Criminal No. 77-154-02)

Argued December 14, 1978

BEFORE SEITZ, Chief Judge, WEIS and GARTH, Circuit Judges.

JUDGMENT ORDER

After considering contentions raised by the appellant, to-wit, (1) the evidence was legally insufficient to establish defendant's guilt beyond a reasonable doubt; (2) the court erred in permitting Ms. McIntosh to testify as to Jasmine Brown's story of the events of the evening; (3) the variance between Count II and the proof at trial requires a dismissal; (4) the court's erroneous charge on corroboration deprived the defendant of a fair trial; and (5) the Virgin Islands sodomy statute is unconstitutional upon its face. Any conviction returned under it must be vacated, it is

Appendix A

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed; it is

FURTHER ADJUDGED AND ORDERED that this judgment is without prejudice to a later determination of appellant's claim that the defendants' joint representation by a single attorney and the trial court's failure to admonish them of the risks inherent in such a course requires that a new trial be ordered. Such determination may be made in appropriate collateral proceedings.

By the Court,

s/ Seitz
Chief Judge

Attest:

s/ T. Quinn
Thomas F. Quinn
Clerk

DATED: December 19, 1978

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1618

GOVERNMENT OF THE VIRGIN ISLANDS

v.

OSWALD JOHN,

Appellant

(D.C. Criminal No. 77-154-02)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Dated: January 17, 1979

By the Court,

s/ Seitz
Chief Judge